Central Georgia Electric Membership Corporation *and* Stanley H. Allen. Case 10-CA-17356

29 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 15 December 1982 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent discharged and refused to reinstate employee Stanley Allen because he successfully pursued a workers' compensation claim relating to injuries suffered while working for the Respondent. Citing, inter alia, *Krispy-Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980), and *Alleluia Cushion Co.*, 221 NLRB 999 (1975), the judge found Allen's pursuit of the claim constituted concerted activity because it was "of common interest to other employees." Therefore, he found the Respondent's conduct violated Section 8(a)(1) of the Act.

After the judge's decision issued, however, the Board in *Meyers Industries*, 268 NLRB 493 (1984), overruled *Alleluia Cushion* and its progeny and held that:[1]

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. [Footnote omitted.]

Thus, the Board no longer finds the activity of an individual employee to be concerted based on a presumption that the issue involved, such as workers' compensation, is of interest to other employees.

Under *Meyers* Allen's pursuit of his workers' compensation claim was not concerted activity and the Respondent did not violate Section 8(a)(1) of the Act by discharging and refusing to reinstate him.[2]

[1] *Meyers Industries*, supra, at 497.

[2] In light of this conclusion, we find it unnecessary to pass on the Respondent's contention that it discharged Allen because his disability rendered him unable to work, not because he pursued the workers' compensation claim.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Jackson, Georgia, on October 19, 1982. The complaint which issued on October 13, 1981, and was predicated on a charge filed on August 26, 1981, alleges that the Respondent violated Section 8(a)(1) by discharging employee Stanley H. Allen.

On the entire record and from my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following findings.

I. JURISDICTION

The Respondent admitted in its answer the allegation that it is a Georgia corporation with an office and place of business located in Jackson, Georgia, where it is engaged in the transmission and sale of electricity. The Respondent also admitted that during the past calendar year, a representative period, it received gross revenues in excess of $250,000 and that it received goods valued in excess of $50,000 from suppliers within the State of Georgia who, in turn, purchased and received those goods directly from suppliers located outside the State of Georgia. However, in its answer the Respondent affirmatively alleged that it is not a public utility within the jurisdictional requirements of the National Labor Relations Board but instead a consumer-owned nonprofit corporation. The Respondent denied that it is an employer engaged in commerce.

The Board's jurisdictional standards have been applied to not-for-profit employers on the same basis as for-profit employers (*Archdiocese of Philadelphia*, 227 NLRB 1178 (1977)). Therefore, the ground alleged in its answer would not serve to justify a finding of no jurisdiction. In view of the Respondent's admission of the jurisdictional amounts and the receipt of goods indirectly from outside the State of Georgia, I find the General Counsel has established that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. (See *San Diego County Assn. for the Retarded*, 259 NLRB 1044 (1982); *Aid for the Retarded*, 256 NLRB 678 (1981); *Welfare, Pension & Vacation Funds*, 256 NLRB 1145 (1981); cf. *Salt River Project*, 231 NLRB 11 (1977), where the employer was found to be a political subdivision, against the situation herein where no evidence was offered to support the indicia used in the *Salt River Project* case.)

II. THE EVIDENCE

The General Counsel alleges that Stanley Allen was illegally discharged because he engaged in concerted ac-

tivities associated with the processing of a workmen's compensation claim against the Respondent.

On March 20, 1979, Allen, who had worked for the Respondent since February 14, 1972, was injured. At that time Allen was employed by the Respondent as a first-class lineman. Allen described the March 20 accident:

> I was in the process of installing a guy-wire on a pole when an overhead line broke and struck me on my shoulder knocking me unconscious. When I came to I was dangling upside down on a pole.

Allen described his injuries as follows:

> It was minor burns on my back and severe burns on my left hip where the voltage exited.
>
> And minor back pain and head pain.

Allen was taken to and treated at Clayton General Hospital following the March 20 accident. He was absent from work for 1 month because of the accident. A claim for workmen's compensation benefits was filed.[1] On April 16, 1979, Doctor E. Q. Abellera certified that Allen was able to return to his regular duties as lineman.

Allen continued to seek medical attention for symptoms he felt resulted from the March 20 accident. From February 1980 through March 1981, he was treated by Doctor Robert T. Willingham, Jr.

From April 1979 until he was terminated on July 14, 1981, Allen continued to work for the Respondent as a first-class lineman. Allen's yearly performance appraisals dated October 29, 1979, and October 28, 1980, reflect that he performed his work in a competent manner.

In late 1980 the Respondent's insurer referred Allen to Doctor K. A. Hoffman of the Emory University Clinic for an evaluation. On November 10, 1980, Doctor Hoffman evaluated Allen and sent a copy of her report to the Respondent's insurer. The Respondent's general manager, R. E. Armstrong, admitted receiving a copy of Doctor Hoffman's evaluation sometime in November 1980. Doctor Hoffman's recommendations contained in that report indicated, in part, the following:

> *Impairment Rating*: This patient receives a 5% impairment of the whole man. This is based on the chronic findings that are highly suggestive of a disc derangement or past nerve root irritation at the C6 nerve root level even though there are no acute symptoms at this time.
>
> It is recommended that the patient not be returned to his job as lineman with the Central Georgia EMC. The excessive leaning and twisting motions involved while climbing and balancing on a power pole would tend to aggravate a problem with a cervical disc or cervical root irritation or stretch and cause recurrence of symptoms. It is also recommended that he not be placed in jobs which require him to stand on the ground and look up frequently or for long periods of time. This too would tend to aggravate or cause recurrence of symptoms of nerve root irritation. Lifting restrictions of 50 lbs. maximum are placed on this patient.

Despite knowledge of the above report, the Respondent continued to work Allen as first-class lineman.

On June 15, 1981, Allen, along with his attorney, Richard Milam, entered into a stipulation and agreement in Board of Workers' Compensation proceedings, with the Respondent's insurer. That stipulation referred to the treatment Allen had received from Doctor Abellera and Doctor Willingham and to the November 10, 1980 evaluation report from Doctor Hoffman. The stipulation mentioned that Doctor Hoffman's report found Allen was suffering from "five percent whole man disability" and stated that it is the contention of the Employer (the Respondent herein) that Allen "does not have in excess five (5%) percent permanent partial disability to the body as a whole as a result of the accident while employed with said employer."

The stipulation further stated that it is the "contention of claimant (Allen) that he had at least ten (10%) percent permanent partial disability to the body as a whole as a result of the accidental injury."

The stipulation and agreement required the Respondent and its insurer to pay Allen the lump sum of $4000 in full settlement of his claim.

Allen continued to work as first-class lineman for the Respondent until July 14, 1981, when he was called off the job and taken to the Respondent's office. There Allen was told first by Line Superintendent Charlie Stewart, and later by General Manager Armstrong, that he was being discharged. Stewart held a copy of the Workmen's Compensation Stipulation and Agreement and the attached November 20, 1980 report from Doctor Hoffman. He turned to the last page of Doctor Hoffman's report, showed Allen the recommendations which were outlined in red and told Allen "you can't do the job no more. We're going to have to let you go." Later that day Allen asked General Manager Armstrong, "you mean you are firing me because of what's written in this report." Armstrong replied, "yes."

General Manager Armstrong testified in one of two affidavits which was received in evidence,[2] that he received the June 15, 1981 Workmen Compensation Stipulation and Agreement which had been approved by the Chairman of the State Board of Workmen Compensation, in the mail on the day he discharged Allen, July 14, 1981. Armstrong testified that he discharged Allen "based on this (the workmen compensation award, stipulation and agreement) and the agreed accuracy of Doctor Hoffman's report."[3]

[1] Allen testified that he did not file the original claim but there is no doubt that one was filed on his behalf.

[2] Because of severe health problems Armstrong did not personally appear and testify at the hearing herein.

[3] However, it is noteworthy that the Respondent's position, as expressed in the "stipulation and agreement," was similar to the recommendation of Doctor Hoffman. The stipulation and agreement stated, "It is the further contention of the employer that Stanley Allen does not have in excess of five (5%) percent permanent partial disability." The Respondent also contended "that STANLEY ALLEN has experienced a physical and economic change in condition for the better and that he is

Continued

Conclusion

The facts are not in dispute that the job of first-class lineman is a strenuous and dangerous position. However, it is equally clear that Allen performed that job in a competent manner throughout his employment.

The Respondent contends that it was because of evidence that Allen was disabled and not because of his successful settlement of the workmen's compensation claim that caused his discharge. However, the record illustrated that the Respondent was aware of all the medical evidence of Allen's alleged disability for some 7 or 8 months before his discharge. During that period, from November 1980, Allen continued to perform his job competently.

The workmen's compensation award contained no conclusions as to Allen's ability or disability. Moreover, the workmen's compensation documents indicated that the Respondent did not disagree with Doctor Hoffman's November 20, 1980 finding of 5-percent disability and, despite that, the Respondent contended that Allen was capable of gainful employment.

The Respondent's general manager admitted that when he discharged Allen he had not discussed Allen's job performance with the immediate supervisor and did not know whether Allen's injury had affected his work. General Manager Armstrong pointed to Allen's claim of a 10-percent permanent disability in the workmen's compensation settlement as a basis for the discharge. However, that claim was not supported by medical opinion and did not include an allegation that Allen could not perform his job.

The record established that the Respondent treated Allen in a disparate manner. General Manager Armstrong admitted that employees that become disabled from continuing their job duties are regularly "retired" into the "National Rural Electric Cooperative Association" (NRECA) Disability Program. That program provides disability benefits of 66-2/3 percent of the employee's predisability monthly earnings with a maximum monthly benefit of $4500 and a minimum monthly benefit of $65. Armstrong testified that one employee was retired into the disability program because of an injury on the job, and more than five others have been retired into the NRECA program because they advanced in age to a point where they were no longer able to perform the strenuous work.

On August 7, 1981, the NRECA advised Armstrong, by letter, that Stanley Allen could not qualify for their disability retirement program because of his July 14 discharge. Armstrong admitted that he contacted NRECA after receiving their August 7, 1981 letter and arranged to retract Allen's discharge and substitute permanent retirement under the NRECA plan. However, Armstrong testified on September 25, 1981, that he did not make those arrangements because Stanley Allen's lawyer had "gotten involved."

On the basis of the above facts and the evidence as a whole, I find that Stanley Allen was discharged on July 14 because he successfully processed his workmen's compensation claim. General Manager Armstrong admitted that the Respondent's procedure normally would not involve a discharge. As shown above, when an employee is disabled the employee is normally retired into the NRECA disability program.

General Manager Armstrong also admitted that the Respondent refused to remedy its discharge action because of the involvement of Allen's attorney. The record shows that from the time Armstrong expressed an interest in remedying the discharge of Stanley Allen, after he received NRECA's August 7, 1981 letter,[4] until he gave his affidavit on September 25, 1981, the only action taken in pursuit of Allen's claim was the filing of a charge with the National Labor Relations Board. That charge was filed on August 26, 1981. The Respondent received service of the charge on August 27, 1981.

The pursuit of a statutorily protected employment related right, which is of common interest to other employees, is considered protected concerted activity (*Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979); *Alleluia Cushion Co.*, 221 NLRB 999 (1975); *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978); *Air Surrey Corp.*, 229 NLRB 1064 (1977)). The evidence is clear and I find that Stanley Allen was discharged and refused reinstatement (at least to a disability retirement status) solely because of his workmen's compensation claim in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. Central Georgia Electric Membership Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employee Stanley H. Allen and thereafter failing and refusing and continuing to fail and refuse to reinstate Allen, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices, I shall recommend it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that the Respondent unlawfully terminated employees Stanley H. Allen, I shall recommend that the Respondent be ordered to offer Allen immediate and full reinstatement to his former job,[5] or if that job no longer

capable of gainful employment having wages equal to or in excess of those wages which he was capable of earning prior to this accidental injury suffered while in the employment of Central Georgia EMC."

[4] Of course, Armstrong knew that Allen's attorney was "involved" in the Workmen's Compensation Stipulation and Agreement since Richard Milam signed that document as "Attorney for Claimant." Therefore, Armstrong's concern with the lawyer's involvement, which must have resulted from events that occurred subsequent his receiving the NRECA August 7 letter and agreeing to rescind Allen's discharge, obviously did not involve attorney Milam's work on the workmen's compensation settlement.

[5] The evidence indicated that a proper remedy may involve reinstating Allen into a disability retirement status. However, that particular issue was not fully litigated. If necessary, the question may be resolved in compliance proceedings.

exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make Allen whole for any loss of earnings he may have suffered as a result of the discrimination against him. Backpay may be computed with interest as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 650 (1977).[6]

[Recommended Order omitted from publication.]

[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).